Cy-Fair Volunteer Fire Department *and* Robert Berleth.

Cy-Fair Volunteer Fire Department *and* Craig Armstrong. Cases 16–CA–107721, 16–CA–120055, and 16–CA–120910

July 15, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 22, 2015, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.[2]

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's findings regarding the Respondent's handbook policies and Social Networking Guideline; the threat allegations; or employee Craig Armstrong's discipline, transfer, and discharge.

We find it unnecessary to pass on the judge's finding that the General Counsel failed to sustain his burden of proving that union activity was a motivating factor in the Respondent's decision to discharge employee Robert Berleth. Even assuming the General Counsel sustained his burden in this regard, we agree with the judge's finding that the Respondent demonstrated it would have discharged Berleth even in the absence of his union activity based on the extent and nature of Berleth's disciplinary history, much of which raised serious safety concerns. We also find it unnecessary to pass on the Charging Party's exception to the judge's failure to find that the Cy-Fair Volunteer Fire Department EMS Employees Association is a labor organization under the Act or to the judge's finding that Berleth sent disrespectful emails because doing so would not affect our disposition of this case.

[2] We shall amend the judge's conclusions of law to conform to his unfair labor practice findings. We shall modify the judge's recommended Order in accordance with our decisions in *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), and *Excel Container, Inc.*, 325 NLRB 17 (1997). Additionally, we shall modify the judge's Order and substitute a new notice to conform to the judge's findings and the Board's standard remedial language.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. By maintaining portions of the following provisions and rules in its handbook and Social Networking Guideline, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act: Overview (page 8), Essential Behavioral Expectations (page 9), Blogging (page 20), Social Media (page 20), Proprietary Information/Confidentiality (page 22), No Solicitation/Distribution (page 23), Employee Records and Privacy (pages 26–27), and Objective (regarding the use of Respondent's logos, name or pictures) and Item 6 of the Social Networking Guideline."

ORDER

The Respondent, Cy-Fair Volunteer Fire Department (CFVFD), Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a provision in the Overview section of its employee handbook prohibiting inappropriate disclosure and/or misuse of employees' personal information.

(b) Maintaining a provision in the Essential Behavioral Expectations section of its employee handbook stating that employees are expected to maintain confidentiality of business knowledge and member/employee information.

(c) Maintaining provisions in the Blogging section of its employee handbook prohibiting employees from (i) posting or discussing information about the Respondent's confidential and/or proprietary information, (ii) using confidential/proprietary information concerning the Department, or (iii) using embarrassing, insulting, demeaning or damaging information about the Respondent, its products, customers or employees.

(d) Maintaining a provision in the Proprietary Information/Confidentiality section of its employee handbook stating that information gathered in conversations, emails, and meetings is confidential and proprietary and may not be discussed with anyone outside the Department.

(e) Maintaining a provision in the Employee Records and Privacy section of its employee handbook stating that inappropriate disclosure and/or misuse of other employees' personal information will result in disciplinary action up to and including termination of employment.

(f) Maintaining a provision in the Social Media section of its employee handbook prohibiting certain activi-

ties that have the effect of harming the goodwill and reputation of CFVFD among its partners, vendors or in the community at large.

(g) Maintaining a rule in the Social Networking Guideline that prohibits employees from referencing or citing Department members, employees or vendors without their express consent.

(h) Maintaining a rule in the Social Networking Guideline that prohibits the use of the Respondent's name, logos or trademark without the Respondent's consent.

(i) Maintaining a provision in the No Solicitation/Distribution section of its employee handbook prohibiting solicitation and distribution even when not on work time if such activity takes place in an area frequented by customers or otherwise interferes with work being performed by other employees.

(j) Threatening employees with discharge for violating its No Solicitation/Distribution rule.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind or revise the unlawful provisions set forth above in paragraphs 1(a) through (i).

(b) Furnish employees with inserts for the current employee handbook and Social Networking Guideline that (1) advise that the unlawfully worded provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that cover the unlawful provisions, or publish and distribute to employees a revised employee handbook and Social Networking Guideline that (1) do not contain the unlawful provisions or (2) provide lawfully worded provisions.

(c) Within 14 days after service by the Region, post at its Houston, Texas-area facilities copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 15, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose a representative to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain a provision in the Overview section of our employee handbook that prohibits inappropriate disclosure and/or misuse of employees' personal information.

WE WILL NOT maintain a provision in the Essential Behavioral Expectations section of our employee handbook stating that employees are expected to maintain confidentiality of business knowledge and member/employee information.

WE WILL NOT maintain provisions in the Blogging section of our employee handbook that prohibit employees from (i) posting or discussing information about our confidential and/or proprietary information, (ii) using confidential/proprietary information concerning the Department, or (iii) using embarrassing, insulting, demeaning or damaging information about us, our products, customers or employees.

WE WILL NOT maintain a provision in the Proprietary Information/Confidentiality section of our employee handbook stating that information gathered in conversations, emails, and meetings is confidential and proprietary and may not be discussed with anyone outside the Department.

WE WILL NOT maintain a provision in the Employee Records and Privacy section of our employee handbook stating that inappropriate disclosure and/or misuse of other employees' personal information will result in disciplinary action up to and including termination of employment.

WE WILL NOT maintain a provision in the Social Media section of our employee handbook that prohibits certain activities that have the effect of harming the goodwill and reputation of CFVFD among its partners, vendors or in the community at large.

WE WILL NOT maintain a rule in our Social Networking Guideline that prohibits employees from referencing or citing Department members, employees or vendors without their express consent.

WE WILL NOT maintain a rule in our Social Networking Guideline that prohibits the use of our name, logos or trademark without our consent.

WE WILL NOT maintain a provision in the No Solicitation/Distribution section of our employee handbook that prohibits solicitation and distribution even when not on work time if such activity takes place in an area frequented by customers or otherwise interferes with work being performed by other employees.

WE WILL NOT threaten you with discharge for violating our No Solicitation/Distribution rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the unlawful provisions described above.

WE WILL furnish you with inserts for the current employee handbook and Social Networking Guideline that (1) advise that the unlawful provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that cover the unlawful provisions, or WE WILL publish and distribute a revised employee handbook and Social Networking Guideline that (1) do not contain the unlawful provisions or (2) provide lawfully worded provisions.

CY-FAIR VOLUNTEER FIRE DEPARTMENT

The Board's decision can be found at www.nlrb.gov/case/16-CA-107721 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Frederic Roberson, Esq., and *Laurie Duggan, Esq.*, for the General Counsel.

David Barron, Esq., and *Norasha Williams, Esq. (Cozen O'Connor, P.C.)*, counsel for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Houston, Texas, on August 12, 13, and 14, 2015. The amended consolidated complaint, which issued on February 9, 2015, was based upon unfair labor practice charges and amended charges that were filed by Robert Berleth and Craig Armstrong on June 21, 2013,[1] July 19, January 6 and 21, 2014. The amended consolidated complaint initially alleges that numerous provisions of the Cy-Fair Volunteer Fire Department Employee Handbook (the Handbook), and its Social Networking Guidelines (the Guidelines), violate Section 8(a)(1) of the Act. It is next alleged that the Respondent further violated Section 8(a)(1) of the Act in the following manner:[2]

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2013.

[2] By motion to withdraw complaint allegations, dated October 9, 2015, counsel for the General Counsel, without objection from the Respondent, withdrew the allegations contained in pars. 9(a) and 9(c) of the complaint.

(b) On about May 17, by Kenneth Grayson, distributed an email to its employees that threatened discipline up to and including discharge for violating the Respondent's No Solicitation/Distribution policy.

(d) On about September 5, by Mark Habelow, threatened an employee with discharge because the employee assisted the Union and engaged in concerted activities.

It is further alleged that the Respondent violated Section 8(a)(1)(3) by discharging Berleth on May 20, by issuing written warnings to Armstrong on August 5 and September 5, by issuing a written warning to, and suspending, Armstrong on August 19, by transferring him to another station on August 27, by suspending him on October 8 and discharging him on December 18, all because they assisted Cy-Fair Volunteer Fire Department EMS Employees Association, (the Union), and engaged in concerted activities.

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The complaint alleges that the Union has been a labor organization within the meaning of Section 2(5) of the Act. In its answer, Respondent denies this allegation, and no testimony was adduced at the hearing on this issue.

III. THE FACTS OF THE HANDBOOK AND GUIDELINES

Although the Respondent's name is Cy-Fair Volunteer Fire Department, it is actually a fire department and an ambulance service, and it employs paid employees, as well as volunteers, in both operations.

It is alleged that since about June 1, 2011, the Respondent has promulgated and maintained in its Handbook, which includes the following provisions, which violate Section 8(a)(1) of the Act:

[Irrelevant paragraphs omitted]

Overview [at page 8]
Options for discipline that the Department may elect to use include verbal corrections, written warnings, suspensions, final written warnings, and/or termination of employment. The Department may, at its sole and absolute discretion, apply whatever form of discipline deemed appropriate under the circumstances, up to and including immediate termination of employment. The Department's disciplinary policy in no way limits or alters the at-will employment relationship. The following is only an illustrative list of reasons for disciplinary actions. Reasons for disciplinary actions are not limited to this list.

[Irrelevant paragraphs omitted]

• Inappropriate disclosure and/misuse of employees' personal information.
• Violation of the No Solicitation/Distribution Policy.

[Irrelevant paragraphs omitted]

Essential Behavioral Expectations [at page 9]
All members/employees are expected to use professional courtesy, discretion and sound judgment when engaging in any contact with co-workers, members of the public,
vendors, visitors and/or other members/employees. Members/employees are also responsible for but not limited to, the following behavioral expectations: maintaining confidentiality of business knowledge and member/employee information, maintaining professional relationships while engaging in job-related tasks, cooperating with others to resolve conflict and achieve goals, maintaining a pleasant attitude while leaving personal business or issues/problems outside the workplace.

[Irrelevant paragraphs omitted]

Department Systems [at page 19]
CFVFD does not permit its employees to post messages on their personal web log, i.e. blogs, which are considered by the Department to be discriminatory, harassing, defamatory or a violation of CFVFD's policy on Proprietary Information/Confidentiality.

[Irrelevant paragraphs omitted]

[at page 19] In addition, employees are not allowed to blog, on-line instant message, play games or visit chat rooms while at work.

[Irrelevant paragraphs omitted]

Blogging: [at page 20] Employees are prohibited from posting or discussing information about the Department's confidential and/or proprietary information (including nonapproved client lists) and nonpublic financial information in any online blog.

[Irrelevant paragraphs omitted]

- The use of confidential/proprietary information concerning the Department is expressly prohibited
- The use of embarrassing, insulting, demeaning or damaging info about the Employer, its products, customers or employees is expressly prohibited

[Irrelevant paragraphs omitted]

Social Media [at page 20]
While the Department encourages employees to enjoy and make good use of their off-duty time, certain activities on the part of employees may become a problem if they have
the effect of impairing the work of any employee; harassing, demeaning or creating a hostile working environment for any employee; disrupting the smooth and orderly flow of work within the CFVFD; or harming the goodwill and reputation of CFVFD among its partners, vendors or in the community at large. In the area of social media (print, broadcast, digital and online), employees may use such media during their off-duty time in any way they choose as long as such use does not produce the adverse consequences noted above.

The Department does not allow employees to utilize social networks (Facebook, My Space, LinkedIn, etc.) for outside business related purposes. No employee may use
Department equipment or facilities for the furtherance of non-work related activities or relationships without the express

permission of the Fire Chief or Board President.
Should you decide to create a personal blog, be sure to provide a clear disclaimer that the views expressed in the blog are the authors alone and do not represent views of CFVFD.

[Irrelevant paragraphs omitted]

Proprietary Information/Confidentiality [at page 22]
The protection of confidential business information is vital to the interests and success of CFVFD. Information gathered in conversations, e-mails and meetings is confidential and proprietary and may not be discussed with anyone outside the Department. Employees shall not release information regarding CFVFD operations, property, policies, or affairs to any person not connected with CFVFD unless authorized by the Fire Chief or Board President, or use such information to advance the personal interests of any employee. Employees shall not release any information regarding an emergency incident to any person not connected with CFVFD unless specifically authorized by the Incident Commander.

[Irrelevant paragraphs omitted]

No Solicitation/Distribution [at page 23]
CFVFD recognizes that employees may have interest in events and organizations outside the workplace. However, solicitation and distribution of literature by an employee for funds, membership, or individual commitment to outside organizations and causes is prohibited on the premises during work time. These topics may be addressed during off-duty time, provided it does not disturb working employees. Solicitation and distribution of literature is also prohibited even when not on work time if such activity takes place in an area frequented by customers or otherwise interferes with work being performed by other employees. Solicitation or distribution of literature by non-employees for any purpose without written consent of the Human Resource Office is prohibited on Department premises at all times. If an employee has a message of interest to the workplace, he/she may submit it to the Human Resource Office for approval and posting on the bulletin board. Station Captains, District Chief or the Chief Officer may remove any harassing or offensive literature placed on Department premises or sites where Department work is performed.

[Irrelevant paragraphs omitted]

Employee Records and Privacy [at page 26–27]
All information contained in a personnel file is the property of CFVFD and is not available for review by anyone other than the employee, his/her Immediate Supervisor and the
Human Resources Department. The collection of employee information will be limited to that needed for business and legal purposes, and all employees involved in recordkeeping will be required to protect the confidentiality of personal information. You have the right to examine your own employee record with regard to evaluations, benefits, records and educational achievements by contacting the Human Resource Office to schedule an appointment; however, documents may not be removed from CFVFD's premises or photocopied without specific authorization of the Fire Chief or Board President. Inappropriate disclosure and/or misuse of other employees' personal information will result in disciplinary action, up to and including termination of employment and notification of the proper law enforcement authorities.

It is further alleged that since about May 1, 2010, Respondent promulgated, and at all material times since that date has maintained, a "Social Networking Guideline." This policy includes the following work rules:

> **Objective**: Employees and members of the Department using social networking sites must do so in an appropriate manner. The use of Department logos, name, pictures or accounts of activities is strictly prohibited without prior board approval. All views and comments are the author's alone and do not represent the views of the Department. Members and employees may be subject to disciplinary actions up to and including termination of employment/membership for violation or as a result of postings or comments made on these sites.
>
> [Irrelevant paragraphs omitted]
>
> [Item 6]: Do not reference or site [sic] Department members, employees, or vendors without their express consent. In all cases, do not publish any information regarding a member, employee or vendor during the engagement.
>
> [Irrelevant paragraphs omitted]
>
> [Item 8]: Department name, logos and trademarks may not be used without written consent.
>
> [Irrelevant paragraphs omitted]
>
> [Item 11]: Comments, postings or pictures may cause individuals or the Department to have issue with your actions. You can be disciplined for your actions, comments or postings if it violates Department policies. Claims of harassment or hostile work environment caused by your actions, comments or postings will result in disciplinary action up to and including termination of employment.
>
> [Item 14]: Disciplinary action- violation of this policy can result in disciplinary action, up to and including termination of employment or membership. Think before you post. Are the comments or postings offensive or detrimental to the Department or persons that will be reading what is written or posted? Employees/members must remember they have a duty to the Department not to embarrass the members/employees of the Department by their comments or postings.

The Respondent revised its Handbook effective December 2014, and its Guidelines about a month later. These revisions will not be considered herein.

IV. ANALYSIS OF HANDBOOK AND GUIDELINES

An analysis of these allegations begins with *Lafayette Park Hotel,* 326 NLRB 824 (1998), and *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). *Lafayette Park* stated, at 825: "The appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 right. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice even absent evidence of enforcement." In

Lutheran Heritage Village, supra*,* the Board was more specific:

> Our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activities protected by Section 7, the violation is dependent upon the showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Handbook restricts employees from discussing or disclosing personal information of other employees in a number of places: under Overview, at page 8, it prohibits "Inappropriate disclosure and/misuse of employees' personal information;" under Essential Behavioral Expectations, at page 9, it states that the employees are expected to maintain "confidentiality of business knowledge and member/employee information;" under Blogging, at page 20, the Handbook states that employees are prohibited from posting or discussing information about the Respondent's "confidential and/or proprietary information" and that "The use of confidential/ proprietary information concerning the Department is expressly prohibited;" under Proprietary Information/Confidentiality, at page 22, it states: "Information gathered in conversations, emails and meetings is confidential and proprietary, and may not be discussed with anyone outside the Department;" and under Employee Records and Privacy, at pages 26–27, it states: "Inappropriate disclosure and/or misuse of other employees personal information will result in disciplinary action, up to and including termination of employment". The Guidelines, under Item 6, states: "Do not reference or site Department members, employees or vendors without their express consent."

Without a doubt, the rights guaranteed by Section 7 of the Act includes the right to discuss terms and conditions of employment with fellow employees and others, including union representatives and, at times, the news media. These discussions with union representatives can include not only the employees' terms and conditions of employment, but those of other employees, as well as their telephone number, address and email address, if known, as part of an organizational drive. As employees could reasonably interpret these restrictions as limiting their right to discuss terms and conditions of employment with others, I find that they violate Section 8(a)(1) of the Act. *Lafayette Park,* supra; *NLS Group,* 352 NLRB 744 (2008).

The provision on blogging, at page 20, states: "The use of embarrassing, insulting, demeaning or damaging info about the Employer, its products, customers or employees is expressly prohibited." The Social Media provision, also contained at page 20, prohibits "certain activities" that have the effect of "harming the goodwill and reputation of CFVFD among its partners, vendors or in the community at large." In *Karl Knauz Motors, Inc.*, 358 NLRB 1754 (2012) and *Costco Wholesale Corp.*, 358 NLRB 1100 (2012), the Board found that similar provisions violate the Act stating, in *Karl Knauz Motors*, that such language encompasses "Section 7 activity, such as employees protected statements- whether to co-workers, supervisors, managers, or third parties who deal with the Respondent- that object to their working conditions and seek the support of others in improving them." Employees have a right to engage in these discussions, even if they include criticism of their employer, its product or others, and I therefore find that these provisions violate the Act.

Under Objectives of the Social Media Guideline, there is a prohibition against the use of the Respondent's name, logos or trademark, without the Respondent's consent. This rule could also be reasonably understood by the Respondent's employees to limit them, or a union, from seeking support from other employees, or publicizing a dispute that they have with the Respondent, by using its name or logo on their clothing or literature. *Boch Imports, Inc.*, 362 NLRB No. 83 (2015); *Pepsi Cola Bottling Co.*, 301 NLRB 1008 (1991).

The No Solicitation/Distribution restriction contained on page 23 states:

> Solicitation and distribution of literature by an employee for funds, membership, or individual commitment to outside organizations or causes is prohibited on the premises during work time. These topics may be addressed during off-duty time, provided it does not disturb working employees. Solicitation and distribution of literature is also prohibited even when not on work time if such activity takes place in an area frequented by customers or otherwise interferes with work being performed by other employees. Solicitation or distribution of literature by non-employees for any purpose without written consent of the Human Resource Office is prohibited on Department premises at all times.

The initial sentence of this restriction prohibits solicitation and distribution by employees "for outside organizations or causes . . . on the premises during working time," further stating that it may be done "during off-duty time, provided it does not disturb working employees." In *Barney's Club*, 227 NLRB 414, 416 (1976), the administrative law judge stated:

> The right of employees to self-organization has often come into conflict with the right of employers to maintain discipline in their establishments and to control the use of their property. Over the years, the Board and the courts have attempted to reconcile these conflicts through the formulation of rules of law which attempt to maximize the scope of the rights of each to the extent that they do not unduly diminish the rights of the other…In attempting to reconcile the legitimate interests of both employers and unions, the Board has looked at the nature of the business. Thus, the rules which have evolved relating to industrial establishments have not been applied to retail stores. [citations omitted]

I find that the first and second sentence of the Respondent's restrictions on solicitation are lawful. The first sentence refers to "work time" so it is presumptively lawful, *Our Way, Inc.*, 268 NLRB 394, 395 (1983); *Beverly Enterprises,* 287 NLRB 158 (1987). As Respondent operates an ambulance service and a fire department, the restriction contained in the second sentence, "provided it does not disturb working employees" is a rational restriction, and a lawful one. The next sentence pro-

hibits solicitation and distribution, "even when not on work time" if it takes place "in an area frequented by customers or otherwise interferes with work being performed by other employees." Although the Board has permitted restrictions such as this in selling areas in retail stores and in casino gambling areas because of the possible disruption to the employer's operation, the instant situation is different. The nature of the Respondent's operations makes it unclear who their "customers" are and how it could affect its operation. I therefore find that this prohibition violates the Act. *Crowne Plaza Hotel*, 352 NLRB 382, 385 (2008). The final sentence prohibits solicitations by nonemployees on department premises for any purpose without the consent of the Respondent's human resource office. The Board and the Courts have recognized a distinction between the rights of employees as compared to nonemployees to be on the employer's property. *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 113 (1956). The theory is that employees are already rightfully on the employer's property pursuant to their employment relationship. In *United States Postal Service*, 339 NLRB 1175, 1176 (2003), the Board, citing *Lechmere, Inc. v. NLRB,* 502 U.S. 527, 533–534 (1992), stated: "In contrast to employees, nonemployees may be treated as trespassers. An employer's refusal to allow nonemployee organizers onto its property to solicit will not violate Section 8(a)(1) unless the organizers have no reasonable nontrespassory means to communicate their message or the employer discriminates against the union by allowing other solicitation," and the union has the burden of showing that there was no other reasonable means of communicating with the employees. *NLRB v. Southern Maryland Hospital Center,* 916 F.2d 932 (4th Cir. 1990). Considering the facts herein, I find that the Union has not satisfied this burden and that the final sentence of this rule does not violate the Act.

V. FACTS REGARDING BERLETH AND ARMSTRONG

Respondent employed a total of approximately 600 employees, paid and volunteers in both operations; Berleth and Armstrong were emergency medical technicians (EMT) employed by the Respondent in its emergency medical service (EMS) operation. At the time of the events to be described (mid to late 2013), the individual in charge of the EMS operation was Kenneth Grayson, the EMS Assistant Chief over the EMS Division. He reported to the fire chief, who reported to the Respondent's Board of Directors. The Respondent has 12 stations for both EMS and fire suppression and each employee is assigned to a specific station. Each station contains a room about ten by ten, with two beds, a chair, a television set, and alarm system with speakers. The EMT employees report for work at 6 a.m. and work 24 hours on, 24 hours off, and 24 hours on followed by 5 days off. Each shift has a junior and a senior supervisor. In addition, EMS employees who are recommended by their supervisors can become field training officers (FTOs); they are paid more than the other employees and train new employees.

A. Union Activity

Berleth, who began working for the Respondent in August 2008, as a paramedic, testified that the first organizing campaign that he was involved in while there began in about early 2011, when he discussed organizing the employees with some other employees. As a result of these discussions, he contacted the International Association of Fire Fighters, (IAFF), but this movement petered out by the Fall of 2011. However, he later testified that he handed out "a handful of cards" in early 2011, and "then we really started collecting in the Fall of 2012" for IAFF. In answer to questions from me, he testified that it started "very loosely" in early 2010, but it was in 2011 that they met with IAFF and conducted meetings. He testified that he resumed his union activity in about September or October 2012, when he spoke to other employees about getting a union. One of those that he spoke to was Armstrong, whom he asked to help him in contacting other employees. In an affidavit that he gave to the Board he stated that he started obtaining signed authorization cards from employees on April 4.[3] Prior to that date he was careful about his union activity, but after April 4 he became more open about it. On Friday, May 17, the Union, filed a petition with the Board, signed by Berleth as Union President, to represent the employees. It was faxed to the Respondent that same day, apparently, by the Union or its counsel. Monday, May 20, was the date when Berleth was to appear before the Respondent's Board where they were to consider the final appeal of his suspension pending termination.

Nathaniel Blue, a paramedic who has been employed by the Respondent for in excess of 8 years, testified that at an ice cream social that he attended sometime during the Spring of 2013, Armstrong approached him, gave him a union authorization card and asked him if he was in favor of the Union. "A couple of weeks or so" later, he and the other employees were called to the office for a meeting (which his affidavit to the Board states was about May 15) that was attended by Grayson. He testified that at this meeting Grayson said that employees were not permitted to distribute union cards on Respondent's premises, and Blue said that he was given a union card by Armstrong.

David Tilbury, who had been employed by the Respondent for about 5 years as a paramedic, until January 2014, testified that after the petition was filed he attended two meetings lead by Grayson and Hannah, although he was uncertain of the date of the meetings. At the first meeting they said that somebody was passing out flyers for the Union and, "they reminded us that, when you're on duty, you can't do these things, that it's against policy and you can be terminated for it." Blue stood up and pointed to Armstrong and said: "One of them is sitting right here." At the second meeting Grayson said that they were getting closer to the election and reminded them that they could be terminated for union activities while they were on duty. Some employees asked questions or made negative comments about the Union, and Tilbury asked if a union would be good for the department, and got dirty looks.

Armstrong testified that he heard rumors of union activity in 2011, but there was nothing definite about it until 2013. On May 3, Berleth spoke to him about starting up a union and gave him cards to distribute. He was asked by counsel for the Respondent:

[3] That is the date that he received his suspension pending termination.

> Q And prior to that meeting in May with Mr. Berleth at the HEB, you were not aware of any union activity going on at the department, were you?
>
> A That is not true[4].

Armstrong testified that at some point, about a month prior to his May 3 meeting with Berleth, while he was having breakfast at a restaurant with Jerry Justice, the B shift junior supervisor, Justice "was discussing Robert Berleth's involvement in starting up a union." Justice said that he was in favor of a union and that it might be the only way to get "a regime change at the top." Justice testified that this is "absolutely not true." In the affidavit that Armstrong gave to the Board, he did not state anything about Justice saying that Berleth started a union, but he testified that Justice told him that the Union would not happen because it would put an end to Grayson's nepotism. Armstrong testified further that the meeting where Blue identified him as a union organizer occurred about a week after he asked Blue to sign a union authorization card at the ice cream social[5].

Grayson testified that a couple of days prior to the date that the petition was filed, May 17, an employee at station 3, who found a union authorization card on the windshield of his car, reported it to a supervisor, Denise Grayson, a shift senior supervisor, and Grayson's wife, who reported it to him. Grayson told her to tell Martha Hannah, HR manager about it and they contacted counsel. In addition, he was informed that an employee of the Cy-Fair Hospital, Bram Duffee, was handing out cards to the Respondent's employees while they were dropping off patients. On the evening of May 14, he sent an email to Hannah and two supervisors, stating, inter alia:

> I was contacted this morning by an employee about a postcard that was left on the windshield of another employee's vehicle. The postcard was asking them to sign up to become a member of "Cy-Fair EMS Employee Association." Not knowing anything about the attempt to form this association, I notified HR, Board President and the Fire Chief…
>
> I understand that several members have asked some of you on what is going on and what is their intent. I can only speculate that there is an attempt to start some type of union. I would caution each of you to watch what you say on this subject to your staff. I would suggest that you advise them to direct their questions or concerns to the HR department.

On the morning of May 17, Grayson sent an email to all of Respondent's EMS employees stating: "I was asked to send this Memo out to all by the HR Department." Attached was the Respondent's Department Policies and Standards and a list of rules the violation of which could result in discipline. The list of rules is preceded by an Overview, which states: "Failure to follow these guidelines may result in disciplinary action, up to and including termination of employment." This is followed by a discussion of discipline, which is followed by 23 possible causes for discipline, the final one on the list, highlighted, was "Violation of the No Solicitation/ Distribution Policy," without any further specificity. In addition, Grayson asked all of the supervisors if they had heard anything about attempts to organize the employees and each reported that this was the first they heard of it. Subsequently, the Respondent conducted a meeting in May and one in June for each shift at which time Grayson answered questions that the employees had and informed the employees that the Union had filed a petition and was attempting to organize them. He does not believe that at these meetings he told the employees what they could and could not do on company property. In answer to a question as to whether Blue identified any employee who was distributing union literature, he testified: "I do not believe I know of any during the meeting. I know there was an email that I believe insinuated there were some people." He believes that there were three names in the email, John Johnson and Bram Duffee, an employee of Cy-Fair Medical Center. He did not testify who the third named employee was.

John Flemmons, Jr., who was employed by the Respondent as a paramedic until he resigned in May 2012, testified that in about the Spring of 2011, he spoke to Berleth about organizing the Respondent's employees; about a day or two later, Grayson asked him to come into his office and with just the two of them there, Grayson said, "I heard there was talk of a union" and Flemmons said that he didn't know anything about it. Grayson told him that it was not in his best interest to get involved with a union and he again denied having any involvement with a union. Grayson testified that he never met with Flemmons in his office and never spoke to him about the Union. After this, Flemmons told Berleth that he didn't mind helping out with the Union, but to keep his name out of it. He also testified that at an ATV rally in about February 2013, when he met Keith Kercho, an employee of the Respondent, whose wife Stephanie Littrell Kercho is a supervisor for the Respondent, Kercho told him "don't back off," that everyone wanted to see what his next step was, and Flemmons said that he shouldn't worry about it, that he and Berleth were in touch with a union and were talking about putting a union together. Ms. Littrell Kercho was not participating in the conversation, although she was listening to it. Littrell Kercho testified that she was present at an ATV rally where her husband and Flemming spoke, but she does not recall what the discussion was about or whether there was a discussion about the Union.

Courtney Johnson, who is the Interim Assistant Chief, EMS for the Respondent, testified that the first time that she was aware of any union activity was after Berleth "was gone," although she was not certain whether that was after his suspension or after it was converted to a final termination on May 20. She learned of it from a telephone call from Grayson, who asked if she knew anything about union activity; she responded that she didn't and was not aware of any union activity on the part of Armstrong.

B. Robert Berleth

Berleth worked for the Respondent as a paramedic from August 2008 to May 20, when his suspension with recommendation for termination was approved by the Respondent's Board of Directors. With the exception of the final 30 days of his

[4] Armstrong's Board affidavit states that prior to this May 3 meeting with Berleth at HEB, he was not aware of any union activity at the Respondent.

[5] The affidavit that Armstrong gave the Board states that the ice cream social occurred on May 10.

employment when he was on A shift supervised by Denise Grayson and Littrell Kercho, he was employed on C Shift supervised by Jeff Low and Cindy King. Berleth was involved in numerous incidents that resulted in warnings or counseling:

The Respondent has had a sexual harassment policy since at least February 2009 and employees are required to sign a sexual harassment acknowledgement form. On November 9, 2009, Berleth was issued a Disciplinary Report and a 24-hour suspension for making inappropriate comments about a coworker. He admitted making the statements and apologized.

On December 14, 2010, Berleth was given a written warning for walking into a patient's room at North Cypress Hospital, with no prior contact. Berleth testified that he walked into a patient's room, which he should not have done, and an instructor in the room complained to his supervisor, which resulted in the discipline.

On February 22, 2011, Berleth was given a CQI Occurrence Report, which is counseling, rather than discipline, for an incident with a patient. Berleth testified that the patient was having a panic attack and he administered a three lead electrocardiogram, which gives a general look at the heart. Low came in and told him that he should use a twelve lead, which gives a more detailed look. After this incident, Berleth met with Low, who instructed him about the twelve lead electrocardiogram.

On March 28, 2011, Berleth was given an Employee Disciplinary Report for an Inaccurate Run record, for which he was suspended for twelve hours. Berleth testified that in late 2010 or early 2011 the Respondent established a rule of mandatory suspensions for employees who enter incorrect run or incident numbers. He entered 04557 rather than 04457 and was suspended. Other employees, including Armstrong, were also suspended for violating this rule.

On April 21, 2011, Berleth was issued an Employee Disciplinary Report for an incident that occurred on April 5. The incident involved a child who was taken to a hospital that did not provide a high enough standard of care that was required and had to be transported by helicopter to a Level 1 Trauma Center. King testified that Berleth had turned over the patient to a lower skilled level employee who made the incorrect determination of the patient's needs and he was given a 36-hour suspension that was reduced to 24 hours.

On June 20, 2011, Berleth and Matt Fletcher allowed a nonfire department employee to drive their ambulance while they cared for the patient in the rear of the ambulance. The initial punishment was a 60-day suspension, but Grayson reduced it to time served (2 days), plus an additional 24 hours. Berleth testified that the patient was in such a critical condition that he requested the civilian to drive the ambulance a short distance, but not on a public road, because both he and Fletcher were needed to care for the patient; he was sunctioning blood out of the airway and Fletcher was attempting to stop the arterial bleeding. Berleth's notes about the incident state that he made the decision based upon what he thought was best for the patient and that Fletcher followed his order. Fletcher's notes state that he asked Berleth if he was sure that they needed the civilian to drive the ambulance, and he said that he was. Littrell Kercho testified that she was dispatched to a traumatic injury that was going to involve a helicopter taking the victim to the hospital, and when she approached the area she saw Berleth and Fletcher's ambulance, but she did not recognize the driver. She told them that it was not appropriate to have a civilian drive the ambulance for safety and insurance purposes. Berleth stated that he was concerned about the patient and whether the helicopter would be able to locate the ambulance, although he understood that he was wrong in having the civilian drive the ambulance. Denise Grayson, the senior supervisor for the shift on that day, testified that was the first time that she knew of an instance where a crew allowed a civilian to drive an ambulance.

Berleth received a promotion and increase in pay when he was promoted to an FTO position on August 21, 2011.[6]

On March 26, 2012, Berleth was given a written warning for not being at work on time. He testified that he did not know that he was supposed to work that day. He arrived at 7:20 a.m.

On September 14, 2012, Berleth was given a verbal warning for disrupting the sleep of volunteers. He came into the room where they were sleeping, turned on the lights and loudly yelled for them to wake up. He was counseled about this.

December 17, 2012: The Respondent received a report from a motorist that Berleth's ambulance was driving in the wrong direction on the Interstate 290 Service Road. Although Berleth was not driving the ambulance, the evidence established that he instructed the driver, Anthony Carpenter, to drive against the traffic flow. In addition, Berleth was the FTO in charge on the ambulance. As a result of this written warning, Berleth's FTO status was removed for 6 months, at which time it would be reevaluated.

On January 28, 2013, Carpenter sent an email to supervisors King and Low in which he stated that "with great hesitation and reluctance" he was resigning, stating that "the hostile work environment that Robert Berleth had created has left me no choice," stating:

> I would like to give you a snapshot of Robert's actions of the past several weeks. Robert has taken every possible chance to belittle me in front of the other staff members, volunteers and students. Cindy was witness to one of these episodes while at training last Friday. He told me to stand up, quit asking questions and let's leave. The whole time he never stated where we were going or why we were deviating from what everybody else was doing. Later that same shift he told a patient that had been involved in a domestic dispute and had been assaulted that he hoped that he used a baseball bat next time. While he was trying to get the patient to press charges against her boyfriend, it was still highly unprofessional and several of the officers on the scene gave him a look. Robert rarely assists in station duties and looks for every opportunity to not wash his truck…He frequently refers to Cindy King as a "worthless cunt." In general, he rarely says anything positive about anybody…He frequently makes innuendos to staff members at

[6] Counsel for the General Counsel's brief contains a typographical error when it states (at p. 31): "The evidence shows that Respondent did not treat Berleth's three disciplinary actions between March 28, 2013 and June 21, 2013, as an impediment when it recommended and approved his position to a training position with more responsibility and more pay." It was actually 2011.

> the hospitals. Because of his attitude and actions, I spend the entire shift trying to avoid being in the same room with him.

On January 29, EMT Paramedic Reinhold Haussecker wrote an email to Hannah in HR stating that while working with Berleth on one shift, Berleth used obscenities to refer to King, Grayson, Denise Grayson, and the Respondent generally. As a result of these statements, Grayson, King, and Low met with Berleth and told him to keep negative statements about coworkers and supervisors to himself, and he was given a verbal warning. Berleth testified that he was spoken to about these allegations, but he was not aware that he was written up and given a warning for them. As regards the language that he used, he testified that King used equally colorful language toward him: during a training meeting in 2010, while he was texting or looking at his cell phone, she came up behind him and slapped the back of his head and said, "pay attention, asshole." King testified that after the January 29 incident, Berleth was transferred to a different shift because "it wasn't a good working environment, when you've got people calling you names." Denise Grayson testified that she has been friendly with employee Lydia Garza for about 25 years. When Garza was promoted to a paramedic position, she sent Garza an email saying, "Way to go, ho." Garza was not offended by it, but Denise Grayson was spoken to by the fire chief about the email. Flemmons testified that he was disciplined for making inappropriate statements to a nurse (no date given) and Tilbury testified that the employees engage in "immature discussions" at times; whether they are appropriate, depends upon the context.

There was an incident on March 28, when Armstrong, who was scheduled to relieve Berleth, called in sick. Supervisor Courtney Johnson sent an email to Denise Grayson about the incident:

> The morning of March 28th Craig Armstrong called in sick. I called Station 1 to tell Robert Berleth he was being held because he did not have relief. He told me "that's not going to work, I have a meeting at 9 and I can't stay." I told him that he had to stay and we would try to find someone to come in and he proceeded to tell me that I needed to call other people and hold someone else because he couldn't stay. I told him that I would let Habelow know and that he needed to stay. When I hung up, I sent messages to see if anyone else wanted to stay but was very upset with Robert for…the abrasiveness of telling me what I needed to do and basically that he said he wasn't staying.

The Disciplinary Report for this incident states that he was suspended, but without any specific period of time, for insubordination. Berleth testified that he had a meeting to attend on March 28, but he did remain on duty and missed the meeting. He did tell Johnson that she should call somebody else to cover for Armstrong, which is "pretty common." He also suggested that Fletcher would stay if they would agree to use an intermediate truck rather than a regular ambulance, which would mean that they would not be able to provide the same level of care. Johnson testified that the Respondent's policy is that you have to remain on duty for up to 12 hours if your relief doesn't come to work. Berleth remained at work that day to cover the shift.

March 30, 2013: After a drop off at North Cypress Hospital, Berleth and his partner, Omar Dar, went to Starbucks to get coffee for staff members at the hospital, a couple of miles away. Littrell Kercho testified that on that date as she was driving she saw their ambulance out of their responding territory. She attempted to contact them by telephone and radio, and asked the dispatcher to do so, but they failed to respond. As she drove to their vehicle, she saw Berleth coming out of Starbucks with coffee, and he told her that he was buying coffee for the nurses at the hospital as they had requested. She testified that although there were no emergency calls to respond to at that time, the Starbucks location was about 10 to 15 miles outside of their designated territory which would have necessitated a longer time for them to respond to a call. The other problem was that they didn't have permission to be outside their territory and didn't respond to her calls. When she approached Berleth on that day he told her that he didn't see any problem because he got coffee for the nurses all the time when he was at Station 9. She told him that it was in Station 9 territory, but not in Station 1, where he was presently stationed.

Berleth testified that because he sees the staff at North Cypress Hospital often, he has driven to get them coffee "very commonly." The reason: "If you keep them happy with you, when you get into the hospital, you can get in, get out, and get on with your life." Otherwise, the hospital staff could make your day difficult. When he went to Starbucks he had his radio and phone, but never received a call. As he left Starbucks, he saw Littrell Kercho standing by his ambulance, speaking to Dar. In an email to Denise Grayson dated April 2, Dar stated that the nurses wrote out their order on a piece of paper and gave it to Berleth and after they got into the ambulance, he asked Berleth if he was actually going to get coffee for the nurses and he said, "heck no." Although he considered it unprofessional to tell the nurses that he would get them coffee and not do so, he was relieved that they would be headed back to their territory. A few minutes later he realized that Berleth was stopping at Starbucks for the coffee as promised.[7] Tilbury testified that while employed by the Respondent he was friendly with a lot of the hospital employees, but he never drove his ambulance to pick up snacks for them, although he heard that other employees have done so. He also testified that even when they weren't responding to a call or transporting a patient, they were required to keep their radios on.

For the last 4 or 5 years the Respondent has had a policy of allowing the crew members to take up to an hour to work out, but they are required to keep their radio with them during this period, in case they are needed for a call. Later in the day on March 30, Berleth requested to be out of service for an hour to work out, and Littrell Kercho told him that he could do so, but that he should keep his radio with him in case he was needed. A call came in and she attempted to contact Berleth and Dar, but they did not answer. She responded to the call and while she was en route, Berleth called her back and she told him of

[7] While the Respondent allows its employees to eat at facilities adjoining their response areas, if not in them, Armstrong, Denise Grayson, and Jennifer Walls, vice president of the Board of Directors, testified that each vehicle has a map designating the areas that the employees are allowed to travel to.

the call, that Ambulance 5 was responding, but she needed him to return to service and he said that he would. When she met Berleth at the location of the call, he was "very abrupt and rude" to her and the patient. Berleth testified that he regularly took the hour of workout time and always kept his radio with him. Very rarely have these workouts been interrupted by a call and, on the day in question, he did not receive a call.

At the conclusion of work that day, the crew taking over their ambulance reported that the heart monitor (Lifepack 15) was not on the truck and that Berleth said that he had no idea where it was. Littrell Kercho called him and she asked where the monitor was and he was rude in answering, saying that it was probably at Willowbrook, where their last call was. He told her that Dar was taking care of it and the phone then disconnected. She checked their call times and found that their last call was 8-1/2 hours prior to the shift change so the monitor was missing from the truck for that length of time without their knowledge. As Dar was caring for the patient, Berleth was responsible for the monitor. She then called Dar who told her that he was getting it, which he did and returned it to the ambulance. Both Berleth and Dar were written up for this incident. Dar's email to Denise Grayson of April 2 states that after their call to Willowbrook Hospital that day, he returned to their vehicle to complete his report, Berleth got in, asked if he asked if he was ready to go, he said he was and they left. They received no other calls and went to bed. The following morning, after completing his checkout routine, he got into his car to go home when Berleth knocked on the car window and asked, "where is the monitor?" He said that the oncoming crew said that the monitor was missing and Dar reminded him that their last call was at Willowbrook Hospital. Berleth tapped Dar's automobile and said, "go, go" and he drove to the hospital where he found the monitor on a wheelchair near the ambulance entrance. The Disciplinary Report dated April 4 states: "Due to multiple incidents of insubordination and policy/procedure violations, I am suspending Robert Berleth for 30 days with recommendation of termination."

Berleth testified that he believes that this incident with the monitor was the first time that he had left equipment behind. He didn't realize that it was missing until the new shift came on and said that it was missing. He asked Dar to retrieve it because he was driving his motorcycle that day, and it was too big to carry on the motorcycle. Flemmons, who was employed by the Respondent for about 12 years until 2012, testified that it was common for employees to leave equipment behind, because they are often in a rush while performing their work. On some of those occasions he discovered his error during the shift and returned to the site to retrieve it. He has left stretchers, monitors and computers at the hospital and was told, "Go pick it up and don't do it again," but was never disciplined for it.

The Respondent has a procedure whereby employees can appeal Disciplinary action. The supervisor's recommended disciplinary action would first go to the Respondent's Board of Directors, meeting in executive session to discuss the case. They will decide whether to uphold or overrule the discipline. If it is upheld, the employee can then appeal to the entire Board of Directors, which meets once a month. By letter dated April 16, Berleth notified Grayson that he wanted to appeal the suspension with recommendation for termination of April 4; on April 24, Hannah notified him that his appeal would be heard on April 29. After a hearing, Hannah notified him by letter dated April 30 that the appeals committee upheld his termination, but that he could appeal that decision to the Board of Directors. On May 6, Berleth showed up for work stating that his 30-day suspension expired on May 4. Because of this, he was given another disciplinary report extending his suspension, pending termination, to 6 months. By letter dated May 13, Berleth appealed his suspension pending termination to the Board of Directors, which was meeting on Monday, May 20. By letter to Berleth dated May 22, Hannah stated, inter alia: "Based on the disciplinary actions you received on April 4, 2013, and prior disciplinary actions, the Board of Director's decision is to terminate your employment with Cy-Fair Volunteer Fire Department." At both stages of his appeals, there was no mention of union activity.

C. Craig Armstrong

Armstrong was employed by the Respondent as a paramedic from 2008 to December 2013. As with Berleth, the Respondent introduced numerous disciplinary actions involving him.

On July 26, 2010, Armstrong was issued a disciplinary report because his vehicle and the station had not been cleaned and that it lacked certain equipment and supplies. The relieving crew told Littrell Kercho that they couldn't believe the condition of the truck and the station. Armstrong testified that he was one of three crew members at the time, but was the only one disciplined. The write up states first offense, verbal warning. In addition, there was a further disciplinary report for Armstrong that day for oversleeping at the shift change and for punching out at 7 a.m. rather than 6 a.m.

On October 25, 2011, Armstrong was given counseling for missing an excessive number of work days. The counseling report states that he will receive a formal disciplinary report for any future absences over the next 6 months.

On January 31, 2012, Armstrong was given a written warning for being slow in leaving for a cardiac arrest call. The policy is that the crew has to be on their way within 1–2 minutes; his ambulance did not leave for 4 minutes. Armstrong testified that he was unaware of the call. Justice testified that he called them twice, but they did not respond and he had to send another truck.

On February 8, 2012, Armstrong was given a written warning for failing to sign the narcotic checkoff form. All ambulances are required to maintain up to date lists of narcotics maintained on the ambulance, and he failed to do that on February 8, 2012. The Respondent's procedure is that each morning, the paramedic on the leaving and the incoming crew, together, inventory the narcotics on the truck. On the following day he received another written warning and a 48-hour suspension for not waking up in time to sign the narcotic checkoff form.

On March 9, 2012, Armstrong was given a written warning and a 12-hour suspension for listing an incorrect date on a run record. Armstrong testified that after he received this write up, Habelow told him that he was receiving too many write ups and that if they continued, it could jeopardize his job.

On March 12, 2013, Armstrong received a written warning for leaving a box of clean dishes in front of the captain's door. Armstrong testified that when he reported for work that day, he found a lot of clean dishes on the rack by the sink: "And I followed the instructions of the captain of the fire station. I put them in a box and I left them by his door, I knocked on the door, and I left them there for him to see what was left behind for us to take care of." As a result of this incident, Armstrong was assigned extra duties during periods that would have otherwise been free time.

On March 30, 2013, Armstrong was given a written warning for not awakening in the morning in time to perform the required tasks. The alarm goes off at 5:45, but Armstrong testified that he is hard of hearing and the volume was turned down so he couldn't hear it. Habelow testified that the Respondent had a policy that employees are to be out by 6:05 and that this was a recurring problem with Armstrong.

On May 15, 2013, Armstrong received counseling from Habelow about his bedside manner. The counseling report states that some of Armstrong's crew members complained about it and Habelow told him to listen to what the patients say and to speak to them in a caring manner. On June 8, 2013, Armstrong was counseled after he lost the fuel card for his ambulance.

On July 31, 2013, Armstrong received a written warning and a 12-hour suspension for leaving an oxygen bag at a patient's home. Armstrong testified that his partner that day, Roberto Diaz, is the one who left the oxygen bag; however, the investigation concluded that as Diaz is an EMT and Armstrong, as a paramedic, Armstrong was in charge. In addition, the investigation found that he was responsible:

> Though Armstrong stated that he was doing patient care, on further review of the call, the oxygen would not have been left on the scene if he had appropriately treated the patient and applied oxygen to the unconscious, unresponsive overdose patient.

Diaz testified that he had been employed by the Respondent for about 2 months when he went on that shift with Armstrong; it was his only assignment with Armstrong. When Armstrong completed taking care of the patient, he handed the bags to Diaz, who handed them to the fire department employees assuming that they would put them in the ambulance. As they were exiting the home, he asked one of the fire fighters if all the bags got on the truck and he said yes. On the following morning King called him and asked what happened to the oxygen bag. He said that it should be on the truck, but she said that it wasn't, it must have been left on the scene, and Diaz offered to get it. He was not disciplined for the missing oxygen bag. Habelow testified that the crew is supposed to check their truck after every call to be certain they are not missing any items. If they catch it early enough, discipline is not warranted. In this situation, it was warranted. In her write up about the incident, she stated that it was Armstrong's third written warning in 2013, in addition to two counseling sessions, all for the lack of attention to details of the job, warranting a 12-hour suspension.

On August 3, 2013, Armstrong was given a verbal warning for being late and was told that the next time he was late he would be suspended. On August 27, he was given a written warning for being late to work. He originally called to say that he would not be in because his daughter was ill, but called shortly thereafter to say that he would be in late as he found somebody to take care of her. Habelow and Justice met with Armstrong and Habelow told him that he had been written up and counseled numerous times for attendance, poor bedside manner and other issues and that the next time he is disciplined, he would be suspended pending termination.

On October 8, Armstrong received an Employee Disciplinary Report stating that neither his ambulance nor the reserve ambulance had been washed, the inventory had not been checked and the ambulance would not start, and therefore had not previously been checked, and that he was found in bed. Paramedic, Jessica Cooper, who was part of the crew that relieved Armstrong, wrote an email to Denise Grayson dated October 7, stating that numerous supplies were missing from the truck and that so many supplies were missing that it appears that the prior crew never checked off the items when they went into service. Justice testified that he regularly inspects the trucks for cleanliness and supplies, performing about 150– 200 inspections yearly. He inspected Armstrong's truck on October 8, and found that both the inside and outside of the truck were dirty and that it was missing some equipment. The inspection rating was unacceptable. When he went to the station to discuss it with Armstrong, he was sleeping. Habelow wrote: "This is repeated offenses. It is recommended that due to work ethic and repeated disciplinary issues that he be suspended with recommendation for termination" Armstrong appealed this decision, which was upheld by the appeals committee. However, at the Board of Directors meeting on October 21, the termination recommendation was overturned and was revised to provide a 48-hour suspension and a requirement of no write ups over the following 6 months. The Board also determined that he should be transferred to a different shift.

On November 13, Armstrong received a written warning for providing an improper dose of medicine. He was working with Supervisor Courtney Johnson that day with a patient in cardiac arrest. She asked him to give her a vial of forty milligrams of Vassopressin, but by mistake, he gave her 20 milligrams. Johnson testified that after he gave her the syringe, she felt that it did not have the proper amount of Vassopressin so she asked him if it was 40 units and he said yes. She asked him again and he again said yes. She administered the medicine to the patient and when she returned to the truck she found a full vial of Vassopressin and realized that the patient had only been given 20, rather than 40 milligrams. She called Grayson and told him what had occurred and that Armstrong appeared very nervous during the call and that she felt that retraining, rather than termination, would be appropriate, and that is what they did.

On December 15, Armstrong did not report for work at 6 a.m. as scheduled. The crew and his supervisor called him on a number of occasions, but he didn't respond. He called in at 6:47 a.m. and said that he had taken medicine the prior evening and had overslept. He was told that they had found relief and that he should stay home. He came in that evening and Johnson told him that due to the previous disciplinary actions, the matter of what disciplinary action should be taken would be decided

by the Board of Directors. By letter dated December 19, Hannah notified Armstrong that the Board of Directors, at a meeting on December 16, voted to terminate his employment.

Toward the conclusion of the hearing, the Respondent introduced into evidence some disciplinary records of other employees to establish that Berleth and Armstrong were not "targeted" because of their union activity. Among others, these records show that four employees were disciplined from November 2011 to May 2013, for leaving equipment; one resulted in a verbal warning, two, in written warnings, and one in a 12-hour suspension. Four employees were disciplined from April 2011 to March 2012, for incorrect run records resulting in suspensions of 12 or 24 hours. One employee was given a 24-hour suspension in June 2012, for sleeping through an assignment, and one received a written warning in October 2011, for not cleaning his truck.

VI. ANALYSIS

It is initially alleged that on about May 17, Grayson distributed an email to its employees that threatened discipline up to and including discharge for violating the No Solicitation/ Distribution Rule contained in the Handbook. I have previously found that one portion of this No Solicitation/Distribution Rule violates the Act and therefore, by threatening employees with discipline up to and including discharge for violating this rule, the Respondent violated Section 8(a)(1) of the Act. Finally, it is alleged that on about September 5, Habelow threatened employees with discharge because they assisted the Union and engaged in concerted activities. As I can find no record evidence to support this allegation, I recommend that it be dismissed.

It is next alleged that Berleth was discharged and that Armstrong received written warnings, a transfer and suspensions because of their union and concerted activities, in violation of Section 8(a)(1)(3) of the Act. Obviously, a discharge can violate the Act even when, as here, the alleged discriminatees have numerous warnings and disciplines so long as the union or protected activities, rather than their work record, prompted the discharge. Under *Wright Line,* 251 NLRB 1083, 1089 (1980), in Section 8(a)(1) or 8(a)(3) cases turning on employer motivation, the General Counsel must first make a prima facie sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. If that is establishes, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct. In Berleth's case, I find that counsel for the General Counsel has not satisfied its initial burden. Berleth and Armstrong's testimony regarding their union activity, is very confusing. Berleth initially testified that the initial organizing campaign began in early 2011 and ended in the Fall of 2011, although he later testified that he distributed some cards in early 2011, but really started collecting authorization cards for IAFF in the Fall of 2012. However, he also testified that he resumed his union activity in September or October 2012, although it is not clear if these solicitations were for the IAFF or the Union. The affidavit that he gave to the Board states that he started obtaining authorization cards from the employees on April 4, when he became more open about his union activities; this is also the date that he was suspended pending termination although that did not become final until the Board meeting on May 20.

The only evidence that the Respondent was aware of Berleth's union activity is Flemmons testimony about his conversation with Keith Kercho at the ATV rally and Armstrong's testimony that while having breakfast with Justice, Justice told him about Berleth's involvement in starting up a union. However, as stated above, I do not credit Armstrong's testimony about this meeting with Justice. Further, even were I to credit this testimony, as Justice said that he was in favor or the Union, I find it unlikely that he would have reported this information to the Respondent. Flemmons testified that Kercho told him (in the presence of his wife, Supervisor Littrell Kercho) not to back off, that everyone wanted to see what his next step was, and that he responded that he shouldn't worry about, it that he and Berleth were talking about putting a union together. In addition to the fact that this conversation would have occurred about 2 months before Berleth began soliciting cards for the Union, Littrell Kercho did not participate in the discussion and testified that she does not recollect the subject of the conversation. I find this evidence too tenuous to establish that the Respondent had knowledge of Berleth's union activities at that time. Further, Grayson's May 14 email to Hannah and supervisors (the veracity of which there is no reason to doubt) states that he knew nothing about the Union's organizational drive. Finally, although the Respondent was aware of Berleth's union activity on May 17, when it received the petition, there was no mention of his union activity at the Board of Director's meeting on May 20, concurring with the termination decision. I therefore find that there is no credible evidence establishing that the Respondent was aware of Berleth's union activity prior to May 17, and recommend that this allegation be dismissed. I should also state that even if I had found that the General Counsel had sustained his initial burden herein, because of the lack of union animus and the extent of the disciplinary actions against him[8], I would have found that the Respondent has sustained its burden that it would have terminated him even absent his union activity.

Armstrong's situation is different. The evidence establishes that at a meeting on about May 15, Grayson told the employees that they were not permitted to hand out cards while they were on duty (or on the Respondent's premises) and, as testified credibly by Blue and Tilbury, Blue pointed to Armstrong and said that he had given Blue a union card. The complaint alleges that the Respondent violated Section 8(a)(3) by the following conduct directed at Armstrong:

(a) August 5, written warning;

(b) August 19, written warning and suspension;

(c) August 27, transfer to another station;

[8] In response to the discipline Berleth received for using obscenities to refer to coworkers, supervisors and the Respondent, counsel for the General Counsel defends that Denise Grayson was not disciplined for her: "Way to go Ho" email to Garza. However, there is a big difference between Berleth's disrespectful emails, and Denise Grayson's email to a friend of 25 years.

(d) September 5, written warning;

(e) October 8, suspension;

(d) December 18, discharge.

Prior to May 15, Armstrong was issued a verbal warning on July 26, 2010, for oversleeping and because his truck had not been cleaned and lacked some equipment and supplies; on October 25, he was given counseling for missing an excessive number of work days; on January 31, 2012, he was given a written warning for not responding promptly on a cardiac arrest call and not answering calls from his supervisor; on February 8 and 9, he was given a written warning and a 48-hour suspension for failing to sign the narcotic checkoff list and then oversleeping on the following day and, again, failing to sign the narcotic checkoff list; on March 9, 2012, he received a written warning and a 12-hoursuspension for listing an incorrect date on a run record; on March 12, he received a written warning for leaving a box of dishes in front of the captain's door; on March 30, he received a written warning for oversleeping; and on May 15, he received counseling for his bedside manner. These infractions all occurred prior to, or on the same day that Grayson learned that Armstrong had given a union card to Blue.

Post May 15 discipline: although the complaint alleges that Armstrong was given a written warning on about August 5, he received a verbal warning, signed by him and Habelow, for being late on August 3. There was no written warning given to Armstrong on about that date. As stated in the complaint, he did receive a written warning and a suspension on August 19, the date that it was signed by Armstrong and Habelow, for an incident on July 31, when he and Diaz left an oxygen bag at a patient's home. The write up concluded that a suspension was warranted because it was Armstrong's third written warning, in addition to counseling sessions, in 2013. The complaint next alleges that Armstrong was transferred to another station on August 27, but the evidence establishes that he was transferred to another station after the August 3 verbal warning. He was given a written warning on August 27, signed by Habelow on September 6, for being late to work after first calling to say that he wouldn't be in because his daughter was ill; presumably, this is the September 5 written warning alleged in the complaint. The complaint alleges that the Respondent suspended Armstrong on October 8, and he was suspended pending termination on that day for not washing his truck, not checking the inventory in his truck and being in bed when he shouldn't have been. Habelow wrote that the discipline was warranted due to the repeat offenses. The Board of Directors overturned this recommendation, revised the penalty to a transfer to a different station and a 48-hour suspension as long as there were no further write ups over the following 6 months. Armstrong received a written warning on November 13, for a mistake in the amount of medicine given to a patient and Johnson, his supervisor at the time, recommended retraining, rather than termination and Grayson agreed. The complaint alleges that he was discharged on about December 18, due to the incident on December 15, when he failed to report for work at 6 a.m. and called at 6:47 to say that he had overslept due to some medicine that he had taken. He was told that due to the previous disciplines, the matter was before the Respondent's Board of Directors, and at a meeting on December 16, they voted to terminate him.

As the Respondent was aware of his union activities, I find that Counsel for the General Counsel has sustained his initial burden under *Wright Line*. The ultimate issue is whether the Respondent has satisfied its burden of establishing that it would have fired him even absent his union activities. Although there is no evidence of animus toward him because of his union activity, the Respondent was aware of it because of Blue's comment to Grayson at the meeting conducted on about May 15, and issued him numerous warnings between that time and his discharge on December 18. However, Armstrong also received numerous warnings prior to May 15 as well, and an analysis of the pre-May 15 warnings with the post-May 15 warnings shows a distinct similarity. Of the discipline listed in the complaint, the warnings of August 3, August 27, and his final warning on December 15, are for being late and/or absent from work, the same infraction that resulted in the warnings and counseling he had received on that subject on July 26, 2010, October 25, 2011, and March 30 before there was any union activity. In addition, the warning and suspension that he received on October 8 for not washing his truck was similar to the infraction that resulted in the warning he received on July 26, 2010. The two remaining post-May 15 disciplines are the July 31 incident where he and Diaz left the oxygen bag at a patient's home and the November 13 incident when Johnson asked him for a vial of 40 milligrams of Vassopressin and he gave her only 20 milligrams. The only suspicious aspect of the warning and 12-hour suspension that Armstrong received for the July 31 incident is that Diaz was not disciplined for the incident. However, as the Respondent's witnesses credibly testified, as Armstrong was the paramedic on the call, he was in charge. Further, Respondent established that four other employees have been disciplined for this error, one, a verbal warning, two written warnings and one 12-hour suspension. Finally, the Vassopressin mistake that Armstrong made was a serious mistake and could have resulted in his immediate termination as provided by the Board of Director's decision of October 21, in overturning his termination; yet, instead of discharging him, they gave him retraining. It appears to me that this, together with the Board of Director's decision on October 21, overturning the recommendation of termination establishes that the Respondent was not out to get Armstrong because of his union activities. I therefore find that the Respondent has satisfied its *Wright Line* burden and recommend that the allegations regarding Armstrong be dismissed.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The following sections of Respondent's Handbook and Guidelines overly restrict employees in the exercise of their Section 7 rights and violate the Act: Overview (p. 8), Blogging (p. 20), Proprietary Information/Confidentiality (p. 22), Employee Record and Privacy (pp. 26–27), portions of the No Solicitation/Distribution Rule (p. 23), Objective (regarding the use of Respondent's logo, name or pictures) and Item 6 of the Guidelines.

3. The Respondent violated Section 8(a)(1) of the Act by

threatening employees with discharge for violating its No Solicitation/Distribution rule.

4. The Respondent did not further violate the Act as alleged in the complaint.

THE REMEDY

Having found that certain provisions of its Handbook and Guidelines violate the Act, I recommend that Respondent rescind these provisions and notify all of its employees by electronic mail that this has been done and that these provisions will no longer be enforced. There was testimony that the Respondent has already revised its Handbook and I leave for a Compliance hearing the issue of whether it must be further revised. In addition to the above, Respondent shall post a notice at each of its facilities notifying its employees about these violations.

Upon the foregoing findings of fact, conclusions of law, and on the entire record, I hereby issue the following recommended[9]

ORDER

The Respondent, Cy-Fair Volunteer Fire Department, Houston, Texas, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Enforcing the following provisions from its Handbook: Overview, page 8, Blogging, page 20, Proprietary Information/Confidentiality, page 22, No Solicitation/Distribution, page 23, and Employee Record and Privacy, pages 26–27.

(b) Enforcing the Objective and Item 6 of its Guidelines.

(c) Threatening its employees with discharge for violating its No Solicitation/Distribution Rule.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all employees by electronic mail that these provisions of the Handbook and Guidelines will no longer be enforced.

(b) Within 14 days after service by the Region, post at each of its facilities in the Houston, Texas area, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining allegations of the consolidated csssomplaint be dismissed.

Dated, Washington, D.C. October 22, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT enforce the following provisions of our Handbook: Overview, page 8, Blogging, page 20, Proprietary Information/Confidentiality, page 22, No Solicitation/Distribution, page 23 and Employee records and Privacy, pages 26–27, and WE WILL NOT enforce the following provisions in our Guidelines: Objective, regarding the use of Respondent's logo, name or pictures, and Item 6 and WE WILL NOT threaten to discharge you for violating our No Solicitation/Distribution Rule.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the above mentioned provisions of our Handbook and Guidelines, if we have not already done so, so that they do not unlawfully restrict the rights guaranteed you by Section 7 of the Act and we will notify all of our employees, electronically that we have done so.

CY-FAIR VOLUNTEER FIRE DEPARTMENT

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-107721 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."